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JAN 19
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 546

CITY OF MERIDIAN
DEFENDANT—APPELLANT

v.

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY
PLANTIFF—APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE OF THE CITY OF GULFPORT, THE CITY OF BILOXI, THE CITY OF McCOMB, AND THE TOWN OF QUITMAN

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INTEREST OF AMICI CURIAE

The cities and town filing this Amici Curiae Brief are representative of the larger, medium sized and smaller municipalities of the 266 municipal corporations of the State of Mississippi. Although not parties to this suit, they, as well as all of the other municipal corporations of the State of Mississippi, are interested in the decision in this case by virtue of the fact that each contends that it is entitled to

collect the 2% charge provided for by Chapter 372 of the Mississippi Laws of 1956 (Mississippi Code of 1942, Section 7716-05(e)). The City of Gulfport actually has a case now pending in the Chancery Court of Harrison County, Mississippi, to discover the amount of such charge due it by Plaintiff-Appellee here, said case being Cause No. 40667 in the Chancery Court of Harrison County, Mississippi. Almost all of the 266 municipal corporations of the State of Mississippi have expressed their interest in this suit by providing legal assistance to The City of Meridian through the Mississippi Municipal Association. (R. p. 285) Pursuant to Rule 42 (4) this brief is filed by four representative municipal corporations, all being political subdivisions of the State of Mississippi, and this brief is sponsored by their authorized law officers.

ARGUMENT

The reasons why this case is reviewable by appeal and why the decision below is incorrect have been clearly set out in the Statement as to Jurisdiction and Brief of Apellant Opposing Motion to Dismiss and/or Affirm herein. Our argument will be addressed to the sole proposition that, if, for any reason, this Court should determine that there is still a state question to be decided, then Appellee is not entitled to a dismissal of this appeal, but it is the duty of this Court to postpone a decision on the question of jurisdiction until the state question has been determined in the State Court, or to reverse this cause and remand it to the District Court with directions to retain the bill, pending determination of the state question.

In *Merideth v. City of Winter Haven*, 320 U. S. 228, 236; 64 S. Ct. 7, 12, this Court made the following statement:

"So too a federal court, adhering to the salutary

policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state courts questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971; cf. Thompson v. Magnolia Petroleum Co., 309. U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876. *It is the court's duty to do so when a suit is pending in the state courts*, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the state action. City of Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355." (Italics ours)

As stated hereinbefore, a suit is now pending in the Chancery Court of Harrison County, Mississippi, a court of record in the State of Mississippi, seeking an accounting from Appellee as to the exact amount owed The City of Gulfport by Appellee under said Chapter 372 of the Mississippi Laws of 1956, and payment of such amount to The City of Gulfport. Appellee here is not a stranger to that action, but is a party thereto. If there is a state question still involved in this case, such question can be conveniently and authoritatively answered in such suit. Since the 2% charge is not being paid by Appellee, it will not be prejudiced by any delay involved.

In the exercise of its supervisory appellate power this Court can make such disposition of the case as justice requires. It can either reverse and remand to the District

Court with the direction to retain the bill, pending the determination of the state question, or can simply postpone the determination of its own jurisdiction pending a determination of the state question. This Court's supervisory appellate power in such cases is set out clearly in *Walling v. Reuter*, 321 U. S. 671; 64 S. Ct. 826, 88 L. Ed. 1001. In that case the Court said (321 U. S. 676-677; 64 S. Ct. 829):

> "It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires. When events subsequent to an appeal may affect the correctness of the judgment appealed from, this Court may vacate the judgment and remand the cause for furthe. proceedings. State of Missouri ex rel. Wabash R. Co. v. Public Service Comm., 273 U. S. 126, 131, 47 S. Ct. 311, 313, 71 L. Ed. 575; Patterson v. State of Alabama, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082 and cases cited; Villa v. Van Schaick, 299 U. S. 152, 155, 156, 57 S. Ct. 128, 129, 81 L. Ed. 91. When it is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the Judgment and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken. Gully v. Interstate Natural Gas Co., 292 U. S. 16, 54 S. Ct. 565, 78 L. Ed. 1088; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 392, 54 S. Ct. 732, 735, 78 L. Ed. 1318; Jameson & Co. v.

Morgenthau, 307 U. S. 171, 174, 59 S. Ct. 804, 805, 83 L. E. 1189; Phillips v. United States, 312 U. S. 246, 254, 61 S. Ct. 480, 484, 85 L. Ed. 800."

In the *Walling* case this Court refused to consider the case on the merits because it appeared that further proceedings in the District Court were in order. The judgment of the Court of Appeals was vacated without the consideration of the merits of the case. In the case at bar if there is a state question to be determined, it would appear that the most expeditious procedure would be for this Court to postpone the question of its jurisdiction pending a decision of the state question.

CONCLUSION

We, therefore, respectfully submit that, if there is sitll a question of state law to be decided, then it would be the duty of this Court to postpone a decision as to its jurisdiction or to reverse this cause and remand it to the District Court with directions to retain the bill, pending a determination of the state question in the proceedings in state court.

Respectfully submitted,

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CERTIFICATE

I, the undersigned Tally D. Riddell, one of the attorneys for the Amici Curiae herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief of Amici Curiae herein, upon Mr. Charles B. Snow, Milner Building, Jackson, Mississippi, Mr. O. Winston Cameron, Threefoot Building, Meridian, Mississippi, and Mr. John A. Boykin, Attorney, Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, by mailing each of them a true copy of said Brief of Amici Curiae.

Witness my signature this the day of January, 1959.

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